

Water Related RAP: Recommendations to DEQ Director

October 21, 2011

To: David K. Paylor, Director

From: Carol C. Wampler on behalf of the Water Related Regulatory Advisory Panel (RAP)

Re: **Recommendation that DEQ Not Develop Permit(s) by Rule**

Background:

Pursuant to the Small Renewable Energy Projects Act of 2009 (§10.1-1197.5 et seq. of the Code of Virginia), the Department of Environmental Quality (DEQ) is directed to develop one or more permits by rule (PBR's) "if it is determined by the Department that one or more such permits by rule are necessary for the construction and operation of small renewable energy projects." DEQ established a Regulatory Advisory Panel (RAP) of stakeholders to consider potential PBR's for each renewable energy resource and to make recommendations to DEQ's Director. The present RAP was established in September 2011 to consider a potential PBR for the water related renewable resources that are listed in the 2009 statute; *i.e.*, falling water, wave motion, tides, and geothermal power.¹

Recommendation:

After careful consideration of the issues, it is the consensus recommendation of the Water Related RAP that it is **not necessary** or appropriate, under current conditions, for DEQ to develop a PBR regulation for renewable energy projects that generate electricity from **falling water, wave motion, tides, or geothermal power**. The RAP further recommends that DEQ re-evaluate the potential need for a PBR regulation concerning these water related renewable energy resources in 2014, or sooner if circumstances or public requests so indicate.

Rationale:

Falling Water

- According to the head of licensing for the Federal Energy Regulatory Commission (FERC), Virginia is pre-empted by FERC on the issues addressed by the 2009 statute and therefore does not have legal authority to develop a PBR for falling water/hydroelectric projects. *cf. First Iowa Hydro-Elec. Co-op. v. Federal Power Com'n*, 328 U.S. 152 (1946)

¹The chapter number 9VAC15-80 will be retained on the Regulatory Town Hall in case the department later determines that a permit by rule regulation is necessary for one or more of these renewable energy sources (falling water, wave motion, tides, or geothermal power).

- It does not appear likely that a hydroelectric project will be developed in Virginia that does not come under FERC's jurisdiction, especially a project large enough to exceed the five megawatts of rated capacity "de minimis" standard adopted in DEQ's other renewable energy PBR's and under previous law by the State Corporation Commission.
- FERC's license requirements include all of the substantive issues addressed by Virginia's 2009 statute.

Wave Motion & Tides

- Based on conversations with the head of licensing at FERC, it is also likely that DEQ is pre-empted by FERC from developing a PBR for any other type of hydrokinetic project, including projects that generate electricity from wave motion or tides. FERC appears to be taking the lead for license decisions regarding these projects in other states.
- According to information provided by a number of experts in the field, Virginia lacks sufficient hydrokinetic resources to support development of these projects with current electricity-generation technology.

Geothermal

- According to experts in the field, Virginia appears to lack the kind of geothermal resource that has the potential for electricity generation.
- Department of Mines, Minerals and Energy regulations (4 VAC 15-170) for commercial and industrial geothermal well permits regulate the technical aspects of drilling wells for geothermal purposes, including resource protection, groundwater monitoring, safety, construction and maintenance.

Supporting Information (attached):

- Minutes of Water Related RAP meetings on September 27 and October 21, 2011
- Compilation of Research & Input from Experts – September 23, 2011 (updated on October 20, 2011)
- *First Iowa Hydro-Elec. Co-op. v. Federal Power Com'n*, 328 U.S. 152 (1946)
- Memorandum by law student intern Connor Kain – July 13, 2011
- List of Water Related RAP membership – September 14, 2011

The Water Related RAP submits these recommendations for your consideration. Please advise if you have questions or would like further information.